United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1450

To be argued by
PETER R. SCHLAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1450

B p/s

UNITED STATES OF AMERICA,
Appellee,

—*against*—

MAXIMO JIMINEZ and JAMES H. MALONE,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1450

UNITED STATES OF AMERICA,

Appellee,

—against—

MAXIMO JIMINEZ and JAMES H. MALONE,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants Maximo Jiminez and James Malone appeal from judgments of conviction entered on September 17, 1976, in the United States District Court for the Eastern District of New York (Weinstein, *J.*), convicting them after a jury trial on two counts of a three count indictment.

Appellants were convicted on Counts One and Three of the indictment. Count One alleged that between the years 1969 and 1971, Jiminez and Malone, together with Dominick Butera (deceased and named as a co-conspirator) and others known and unknown to the grand jury, conspired to use their authority as police officers acting under color of law to deprive United States citizens of their civil rights, in violation of Title 18, United States Code,

Section 241. Count Three charged that on the 18th day of March, 1971, within the Eastern District of New York, appellants Jiminez and Malone used their authority as police officers acting under color of law to extort approximately $4,500.00 from John Boland and William Armond, thus depriving Boland and Armond of the right not to be deprived of property without due process of law, in violation of Title 18, United States Code, Sections 242 and 2. Both appellants were acquitted of the charges in Count Two of the indictment, which alleged that they violated the civil rights of Ismael Quinones by unlawfully taking from him approximately $2,500.00, also in violation of Title 18, United States Code, Sections 242 and 2.

Appellant Jiminez was sentenced to a term of imprisonment on Count One of nine years, to run concurrently with a one year term on Count Three. Appellant Malone was sentenced to a term of imprisonment on Count One of seven years, to run concurrently with a one year term on Count Three. Both appellants are presently free on bail.

Statement of Facts

The Government's Case

A. Introduction

This case involves a further chapter in the continuing saga of the Special Investigation Unit ("SIU") of the New York City Police Department's Bureau of Narcotics. Jiminez and Malone were both members of the SIU, which was responsible for initiating narcotics investigations and making arrests of high level drug dealers. The unit represented the elite of New York City Police Department narcotics detectives. See gener-

ally *United States* v. *McClean*, 528 F.2d 1250 (2d Cir. 1975). Jiminez and Malone were members of the same field unit operating within the SIU. These field units consisted of three to five men from the SIU supervised by a police sergeant (64).[1] As the record in this case shows, the SIU was one of the most corrupt and lawless units in the New York City Police Department, its members engaging in thievery, extortion, perjury and deliberate violations of constitutionally mandated rights.

The evidence adduced at trial showed that between the years 1969 and 1971 the legitimate function of the SIU was perverted and subordinated to the end of obtaining sums of money for SIU members, including the appellants, through theft and extortion from narcotics dealers and suspects who were subjects of SIU investigations. The testimony of the former SIU commanding officer, Captain Daniel Tange, outlined the substance of the conspiracy (Count One). Tange also testified to the theft of approximately $11,700 from Sabino Losada, Basilia Herrera and Rolando Estrada by himself, appellant Jiminez and other members of the SIU in July of 1969. Losada himself testified to that theft, while Losada's former building manager, George Maurer, testified to the presence of an illegal wiretap on Losada's telephone maintained by Jiminez and his team.

Detective Joseph Fasanella testified to the theft of $2,500 from Ismael Quinones by the Jiminez—Malone—Butera SIU team in February of 1971, and John Boland, a former narcotics trafficker, testified to the theft of $4,50· by Jiminez, Malone and Butera from himself and Willie Armond in March, 1971 (Count Three). Pedro LeBron recounted an incident in June of 1971 when Jiminez and Malone took $2,000 from him.

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[1] Unless otherwise indicated, references are to pages of the trial transcript.

B. Captain Tange Joins the Conspiracy

In February of 1968, Captain Daniel Tange was made the commanding officer of the SIU (58). In the late spring of 1969, Tange approached a Sergeant Hourrigan (deceased at time of trial) and told him that he (Tange) would like to be included as an equal partner in any "scores" [2] which were made by the SIU teams. Hourrigan replied that he was glad Tange had finally decided to go along, and added that some of the officers in the unit were concerned about the fact that Tange had not previously asked to join the corruption scheme (61-62). Thereafter, Sergeant Hourrigan brought Sergeant O'Brien to Captain Tange and told him that O'Brien would also be willing to include Tange as a partner (62-63). Shortly thereafter, Sergeant Gabriel Stefania mentioned to Tange that Hourrigan had spoken to him and that he (Stefania) was also willing to have Tange share in the profits of scores (63-64). The detectives of the SIU then began on an intermittent basis to give Tange $500 and $1,000 cash shares. The cash would often be given by an individual detective, although on occasion several SIU members would give Tange the money at the same time (64-69). The stage was set for the Losada score.

C. The Losada Score: Jiminez Scores on the Score

In July of 1969, Sabino Losada was a 43 year old ~~Cuban refugee employed~~ as an accountant in an export business by one Rafael Patino. Patino also was involved in narcotics trafficking and had convinced Losada to act as a courier (401-403). Unfortunately for Losada, his movements were closely monitored by an illegal wiretap installed by appellant Jiminez and fellow SIU members

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[2] Money received illegally in the course of police duties (60).

Dominick Butera and James Mullane. In April of 1969, Jiminez and the rest of his team had approached George Maurer, the building manager of 8710 34th Avenue, Jackson Heights, Queens, and inquired about Basilia Herrera, a female residing in the building. Maurer told Jiminez and his cohorts that Mrs. Herrera lived with Sabino Losada in Apt. 1P (461-463). The officers told Maurer that they were looking for Losada. Maurer verified the identities of the SIU team members by calling a number at the Narcotics Bureau which the officers gave him (462). A few days later the team returned and asked Maurer for an empty room in the building as a location for a wiretap. Maurer supplied them with the keys to a room in the basement. The team cautioned Maurer not to mention the wiretap to anyone, especially the local 110th Precinct (462-464). At a subsequent meeting in Maurer's office, Jiminez informed Maurer that shortly he would be setting up the equipment and, one week later when Maurer entered the basement to retrieve some fishing gear, he observed Jiminez' newly installed wiretapping apparatus (465-466).

On July 14, 1969, Losada, acting on Patino's instructions, drove in a rented car to Manhattan to meet one Rolando Estrada for the purpose of delivering to him a kilogram of heroin (403-405). Estrada was to pay $10,000 to Losada for the package (415). Losada returned to Jackson Heights with Estrada to complete the transaction and parked a few blocks from the 34th Avenue apartment building. He then called Basilia Herrera from a public phone and requested that she bring down the kilogram of heroin to the car outside the apartment building (405-408). The Jiminez team, of course, was able to overhear this conversation on their illegal wiretap; and, when Herrera entered the car with the package, Losada, Estrada and Herrera were arrested

by Jiminez, and Detective James Mullane. Along with the package of heroin, Jiminez seized an envelope containing the $10,000 which Estrada was to pay to Losada. Jiminez ordered Losada to accompany him to Apartment 1P so that the premises could be searched. As they were walking, Jiminez asked Losada in Spanish how much money was in the envelope he had taken from Estrada. Losada replied that he expected to receive $10,000 (409-415). Seeing a chance to score on the score the team was about to make, Jiminez ordered Losada to tell anyone who asked that Losada expected to receive only $5000 (415). In the apartment the officers found another $1700 (416).

Jiminez, Hourrigan, Mullane and their prisoners were joined shortly by Captain Tange, who had been called by Hourrigan. Hourrigan told Tange that they could all score if they let Basilia Herrera go. Tange agreed, and the four divided up for themselves and Detective Butera, a team member who was not present that day, a sum slightly in excess of $6000 (one half of the $10,000 taken from Estrada plus the money found in the apartment). Of course, Jiminez had not told his fellow team members of the $5000 he had kept for himself. (72-73).[3]

D. The SIU Keeps Up Good Relations With Captain Tange

In August of 1969, Captain Tange left New York to attend the FBI School in Washington, D.C. The 37 year old Captain was clearly a man whose fortunes were

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[3] In state court the charges against Losada were dismissed after a pretrial determination that there was insufficient probable cause for his arrest.

rising, and the members of the SIU knew that his continued involvement in their criminal enterprise would give them a valuable ally in the coming years. During this period of time two members of the SIU flew down to Washington, D.C. to give the Captain $500 (74-75).

When Captain Tange returned from Washington, he was assigned to the Police Academy, and SIU officers continued to meet with him to give him money. One of these meetings occurred at the end of 1969. Tange met with Jiminez, Butera and Hourrigan at a Restaurant near the Narcotics Bureau. There, they paid Tange his $1,000 share for a score which they had made in his absence (74-79).

E. The Jiminez-Malone-Butera-Fasanella Team Scores on Ismael Quinones, and Discovers the Cut is too Small

On February 16, 1971, Detective Joseph Fasanella joined the SIU team consisting of appellants Jiminez and Malone and Dominick Butera. At the time, the team was conducting what was primarily a surveillance investigation of Ismael Quinones, a suspected narcotics trafficker. As the team explained to Fasanella, Quinones had already been scored by another team for $30,000. Since that time, Quinones had had his phone removed, suspecting that a wiretap had been his downfall, thus eliminating the possibility of a wiretap and making the physical surveillance necessary (195-197).

At four o'clock on the morning of February 20, 1971, a decision was made to execute a previously obtained search warrant for Quinones' apartment in Brooklyn (198). Observation indicated that Quinones had been trafficking in narcotics the previous evening. Quinones

was seized in the doorway of the building by Jiminez, Malone, Butera and Fasanella and taken up to his apartment (200-201). There, narcotics were found, and Butera asked Quinones if he had anymore drugs or money, Quinones indicated that he did not (201-202). As the search continued, however, Butera found a package of money. He slapped Quinones in the face with the packet of bills and yelled, "I thought you didn't have any money" (200-203). Altogether $2500 was found that night in the Quinones apartment (208).

Following the discovery of the money, a discussion was had between Quinones and the members of the team as to a possible $25,000 payoff for "a walk."[4] The money was to be paid by Quinones' brother in the morning. Butera told Quinones that they would have to arrest him, but that they would "cut him loose from court" (203-204). In fact, the team intended to steal the money and lock Quinones up anyway (204-205).

Quinones was then taken to Manhattan for processing. Although he had been arrested in Brooklyn, a decision was made by the entire team to "move the collar" to Manhattan because of the officers' greater familiarity with the courts there (209-210).

After arresting Quinones, Jiminez insisted that Fasanella stop at a drug store to pick up lactose, a cutting agent often used to dilute cocaine. Fasanella asked Jiminez why he wanted the lactose and was told that it was needed in order "[to] make more than we have"

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[4] Quinones would get "a walk" if no charges were pressed against him (204).

(207-208).[5] When Fasanella returned to the station house he was handed approximately $400 by Butera as his share of the money taken from Quinones (208). Butera told Fasanella that he had had to cut in Lieutenant Egan and Sergeant O'Brien, but that Sergeant O'Brien didn't want Fasanella to know he was receiving money (231).[6]

Several days later Fasanella attended a party for several Bronx Assistant District Attorneys who were entering private practice. Butera, Jiminez, and Malone were also present. Fasanella expressed his dismay at having to leave the team. Jiminez blurted out that Lieutenant Egan had felt that the extra man on the team was reducing his own share. Turning to Malone, Fasanella expressed his disgust that for receiving his $400 share he had to leave the team. Malone replied that the score from the Quinones arrest was such a small one that he had given away his share (216-219).

F. The Boland-Armond Score

In March of 1971 a narcotics trafficker, John Boland, delivered a kilogram of heroin to his customer Willie Armond. The cost of a kilogram was $20,000, but Armond was $10,000 short and it was agreed that Armond would pay the balance of the money due the next

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[5] Jiminez testified that lactose cannot be used to cut cocaine (970-971). In the Government's rebuttal case, a forensic chemist for the Drug Enforcement Administration testified that half of all samples of cocaine from seizures tested were diluted with lactose (1100-1102).

[6] Shortly thereafter, Fasanella received a phone call from Butera telling him that he was to be transferred from the Jiminez team. Lieutenant Egan then got on the phone and told Fasanella that he would be starting his own team.

day. During this same time, Boland gave $3500 in small bills to a bank teller, John Patten, who was a friend of his, and asked him to change the money into large bills. On March 18, 1971, Boland called Armond and agreed to meet him at Parkers Diner in Queens, New York at 8:30 that evening for the payoff. Boland also called his associate, John Patten, and similarly arranged to meet him that evening at Parkers Diner (520-524).

Boland arrived at 8:30 P.M. and parked his car on the street in front of the waiting Patten. Patten slid into the passenger side of Boland's car and handed him the money. The two then sat back and awaited the arrival of Willie Armond. Patten pointed to a man in a telephone booth and indicated that he believed that they were being watched. The man in the booth turned out to be appellant Jiminez (524-526).

Just before 9:00 P.M. Armond drove past Boland's car. Boland, with Patten still in the car, followed him around the corner into the diner's parking lot and pulled alongside. Boland then got into Armond's car, whereupon Armond told Boland that he had brought only $9,000 (526-528). Almost immediately Jiminez, Malone, and Butera appeared on foot out of the dark and pulled Boland, Armond and Patten out of their cars. Jiminez questioned Boland separately, threatening at one point to place narcotics in Boland's car and then asking for half the money Boland had received from Armond (528-535). Boland was allowed to confer for a moment with Armond, and when Armond refused to give up any of the money, the pair was driven to the 114th Precinct.[7] There, in a squad room, the three detectives repeatedly cajoled and threatened Boland and Armond, demanding that they give up the money. Finally

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[7] Patten was released in the parking lot.

the detectives threatened to turn the cash over to the Internal Revenue Service. Boland was again left alone with Armond to confer. Armond finally saw the light, and Boland then told Jiminez that they would give the officers $4500. Jiminez walked over to Malone and Butera and held a short conference with them. Jiminez then returned and agreed to accept the smaller amount. Malone then had Boland and Armond sign receipts for $9,600 (Government Exhibits 8 and 9) over Armond's protest (536-540).

As they made ready to leave, Jiminez told Boland to give him a fake address for his report to prevent any possible follow up investigation by another team. Jiminez then displayed the $3500 given to Boland by Patt[illegible]nd one packet of money from Armond and asked him if he was sure that would be $4500. Boland told him it would be approximately that amount. The rest of the money was then returned (542-544).

As Jiminez, Malone and Butera were leaving, the desk sergeant requested a statement as to what had occurred. Jiminez obliged by telling him that money had been returned. The sergeant then logged (Defendant's Ex. M) the information and the officers departed with Boland and Armond (544-546).*

G. The LeBron Theft

Pedro LeBron had been working as a practical nurse since 1947 after his honorable discharge from the United States Army. Although gainfully employed, he had begun supplementing his income by trafficking in narcotics (650-653). On June 10, 1971, he was in his apartment at 1870 Morris Avenue, in the Bronx, with his girl-

* Boland and Armond were never arrested.

friend, Olga Torres, and her cousin, Luis Martinez. They were awaiting the arrival of Hector Correa, LeBron's drug contact (653-657). LeBron was wearing a bathrobe, and in his pocket was $1,300 to pay for the narcotics. In the bathroom, in a cabinet, was another $500 and a quantity of narcotics. An additional quantity of drugs was on the table. In a jacket hanging in a closet was another $200 (657-659).

At approximately 5:00 P.M. the buzzer rang, and LeBron pushed the button to release the lock on the main door to the building. Moments later, Malone and Jiminez entered the apartment with Mrs. Torres' child. They were followed by three New York City detectives who were dragging Correa and another man in tow. After quickly finding the cash in the apartment, Malone and Jiminez counted out the money in the living room in front of LeBron and placed $2,000 in an envelope. LeBron asked for a receipt, but it was refused. Malone held on to the envelope and walked into the kitchen. LeBron never saw the money again (657-663).

The Defense Case and the Government's Rebuttal

Appellant Jiminez took the witness stand and gave an incredible version of the events described above. He testified first that on July 14, 1969, he was outside Losada's apartment building as the result of an informant's tip that something was to happen in the area. He stated that he had never heard of Losada, Estrada or Herrera before, and that it was only his "intuition" (921) that lead him to conclude that the brown bag which he claimed Losada was carrying contained narcotics (820-824, 921). Jiminez also testified that no

money was recovered from Losada and that the officers had actually seized four kilograms of heroin, not just one kilogram as Losada had testified (824-825), although, curiously, an affidavit for a search warrant (Defendant's Exhibit Y) written by Jiminez on the afternoon of July 14th stated that only 2 kilograms were seized.

On cross-examination, Jiminez stated that he took the heroin home with him that night because the Police Laboratory was closed (1006-1007). On the Government's rebuttal case, Sergeant Toomey, Administrative Supervisor at the New York City Crime Laboratory, testified that at the time the Police Laboratory was opened 24 hours a day, 7 days a week (1096-1097). Earlier testimony by detective Fasanella revealed that Jiminez had on past occasions attempted to dilute seized narcotics with cutting agents (207).

With respect to the extortion of money from Boland and Armond, Jiminez testified that the desk sergeant at the 114th precinct counted the money himself (777-784) and that subsequently Butera notified the Internal Revenue Service that Boland and Armond were suspected drug dealers and had had in their possession large sums of cash (1074-1076). On the Government's rebuttal case, the desk sergeant, Joseph Fealey, testified that he had not counted any money on March 18, 1971, but rather had relied on the detectives' word (1105-1108). Representatives of the IRS for the Eastern and Southern Districts of New York testified that records are kept of all incoming phone calls reporting possible tax evasion and that neither Jiminez, Malone nor Butera had ever reported that Boland or Armond were in possession of $12,500 on March 18, 1971 (1137-1141, 1144-1146).

Appellant Malone chose not to testify.

ARGUMENT

POINT I

Appellants Have Failed To Show That The District Court Improperly Sentenced Them.

Appellants assert that the district court failed to individualize their sentences and that it improperly penalized them for failing to cooperate with the United States Attorney's Office in its police corruption investigation. Appellants base their claim on statements made by Judge Weinstein at sentencing on September 17, 1976. We submit that appellants' contention is without merit.[9]

At the outset, it must be noted that this Court has consistently recognized that sentences are not generally reviewable. *United States* v. *Robin*, — F.2d —, Slip op., 5829, 5834 (2d Cir., October 15, 1976). Sentencing is a matter totally within the discretion of the trial court, and a sentence which is imposed in accordance with procedural requirements and is within statutory limits will not be disturbed, *United States* v. *Seijo*, 537 F.2d 694, 700 (2d Cir. 1976), absent a showing "that

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[9] Appellant's Appendix only contains a copy of the transcript of the sentencing of appellant Jiminez. We have been advised by the Eastern District Court Reporters that no transcript was ordered of appellant Malone's sentencing minutes. Thus there is presently nothing in the record on appeal on the basis of which appellant Malone can argue, and this Court could determine, that Judge Weinstein abused his discretion when sentencing Malone. Consequently, we have addressed our argument in this Point to the sentencing of appellant Jiminez. In addition, we wish to advise the Court that subsequent to receipt of appellants' brief, we have ordered the transcript of appellant Malone's sentencing.

the sentencing judge acted on the basis of erroneous assumptions or information that was materially incorrect," *United States* v. *Stein*, — F.2d —, Slip op. 211, 221 (2d Cir. October 22, 1976), or evidence that he employed a fixed and mechanical approach rather than passing sentence on an individualized basis, *United States* v. *Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974). Here, appellants' sentences are within the statutory limits, and there is no assertion that the court sentenced on the basis of incorrect information.

Moreover, the record clearly undercuts appellant Jiminez' contention that the court used improper standards in sentencing. Indeed, the record shows that Judge Weinstein took into account the positive aspects of Jiminez's record on the police force (Appellants' Appendix, 41a), his relationship with his family and the community (Appellants' Appendix 54a), and his general background (Appellants' Appendix 51a). In addition, the court emphasized that in passing sentence it was not holding against Jiminez the fact that he went to trial and that he had the right to remain silent (Appellants' Appendix, 59a).

Furthermore, "(f)ollowing the highly desirable course of making explicit . . . factor[s] he deemed material for the sentence," *United States* v. *Hendrix*, 505 F.2d 1233, 1234 (2d Cir.), *cert. denied*, 423 U.S. 897 (1975), the court stated that it was taking into account "the record of the trial" (Appellants' Appendix 42a), and the court's view that Jiminez had committed perjury on the witness stand (Appellants' Appendix, 54a). At the same time, the court, quite properly, observed that since Jiminez had not cooperated with the United States Attorney's Office, he was not entitled to the favorable consideration customarily given at sentencing time to those defendants who do assist the government (Appellants' Appendix, 54a-55a).

On the basis of this record, we fail to see how it can be argued that the court acted improperly in its sentencing of Jiminez. In *United States* v. *Hendrix*, *supra*, this Court determined that it was proper for a trial judge, when sentencing, to consider the fact that the defendant testified falsely on the witness stand, if the judge believed beyond a reasonable doubt that such was the case. Based on Jiminez' incredible testimony in this case, we submit that Judge Weinstein was fully justified in concluding that Jiminez had perjured himself.

It is clear that Judge Weinstein carefully considered the sentence he imposed after having viewed all the factors available to him. *United States* v. *Foss*, 501 F.2d 522 (1st Cir. 1974), cited by appellant for the proposition that deterrence cannot be the only factor in sentencing, in fact upholds exactly the procedure followed by Judge Weinstein. In *Foss*, the court indicated that deterrence might be an appropriate end in sentencing of a public official.

> "There thus remains room, even when imposing an acceptably individualized sentence, for a judge to look beyond the offender to the sentence's presumed effect on others. The court may send a bribe-taking official to jail even though there is little chance of a repeat offense, no public danger if he is free, and no likelihood that jail will rehabilitate him. The court's duty to individualize the sentence simply means that, whatever the judge's thoughts as to the deterrent value of a jail sentence, he must in every case reexamine and measure that view against the relevant facts and other important goals such as the offender's rehabilitation. Having done so, the district judge must finally decide what factors, or mix of factors, carry the day. While the judge's conclu-

> sions as to deterrence may never be so unbending as to forbid relaxation in an appropriate case, they may nonetheless on occasion justify confinement although other factors point in another direction." 501 F.2d at 528.

At the same time, it was hardly error for the court to stress the difference in the sentence it would have imposed had appellant Jiminez cooperated with the Government. In *United States* v. *Sweig*, 454 F.2d 181 (2d Cir. 1972), the sentencing court indicated, as did Judge Weinstein here (Appellants' Appendix 55a, 59a), that if at some future date the defendant decided to cooperate with the Government it would favorably entertain a motion to reduce sentence. On appeal, the defendant alleged, in much the same manner as appellant Jiminez does (Appellants' Brief, 13), that by taking cooperation into account in this manner the court "punished" the defendant for exercising his right against self-incrimination. 454 F.2d at 183. This Court rejected the self-incrimination argument, pointing out that the judge had simply "stated expressly the 'universally known possibility' that cooperation with law enforcement officials would be entitled to consideration." id. at 1.84.

Significantly, the *Sweig* panel stated that the case before it was "indistinguishable" from *United States* v. *Vermeulen*, 436 F.2d 72 (2d Cir.), *cert. denied*, 402 U.S. 911 (1971). In *Vermeulen*, this Court upheld the district judge's imposition of a maximum term upon a drug trafficker who continued to refuse to cooperate. There, the sentencing court had stated,

> "Maybe if he is put away for a little more * * * * he might find some way of cooperating and he might be able to get some help in the reduction of any term that he may be sent up for." 436 F.2d at 77, n. 13.

The *Vermeulen* court specifically stated that the line between cooperation and self-incrimination was "quite visible" and distinguished its case from *Thomas* v. *United States*, 368 F.2d 941 (5th Cir. 1966), relied upon by appellant Jiminez, where the sentencing judge sought a confession from a defendant who had not pleaded guilty and gone to trial as a sign of penitence.[10] But see *United States* v. *Rogers*, 504 F.2d 1079 (5th Cir.), *cert. denied*, 422 U.S. 1042 (1975).

Finally, in *United States* v. *Malcolm*, 432 F.2d 809, 817 (2d Cir. 1970), this Court noted that "there can be no question that a defendant's cooperation in the investigation is highly material to mitigation of punishment not only because the defendant should be rewarded for his services to the community but also because cooperation with law enforcement authorities is a significant step toward rehabilitation."

In conclusion, we submit the court here carefully considered a wide range of relevant factors in determining the sentence to be imposed upon appellant Jiminez, with the result that it properly sentenced Jiminez on an individual basis, rather than by use of improper standards, as is alleged.

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[10] It is worth nothing that in his concurring opinion in *United States* v. *Stein*, *supra*, Judge Lumbard stated that he would have set aside the sentence imposed on the cooperating defendant Stein even had the reasons for the majority's vacatur of the sentence not existed.

> "In my opinion to let such a sentence stand would seriously cripple the necessary efforts of government to secure cooperation of male-factors without whose assistance and testimony it is often not possible to prosecute their many partners in crime." Slip op. 211 at 228 (October 22, 1976).

POINT II

Appellants Have Failed To Established That They Were Prejudiced By Pre-Indictment Delay.

Appellants argue that they were prejudiced by pre-indictment delay. They base the claim on the fact that the indictment against them was not returned until the final day of the five year statute of limitations and that by the time of trial former SIU members Dominick Butera, who was named as an unindicted co-conspirator, and Sergeant Hourrigan were both deceased. The contention is without merit.

In order for a defendant to successfully raise a claim of pre-indictment delay he must, at the very least, show that the delay resulted in some specific prejudice to him, thus constituting a denial of due process. See *United States* v. *Marion*, 404 U.S. 307 (1971); *United States* v. *Eucker*, 532 F.2d 249 (2d Cir. 1976); *United States* v. *Foddrell*, 523 F.2d 86 (2d Cir.), *cert. denied*, 423 U.S. 950 (1975). This appellants have not done. They have simply made the bald assertion that since Butera and Hourrigan were deceased they were unable to consult with appellants concerning their knowledge of, and participation in, the SIU conspiracy. Appellants have failed entirely to show how, on the basis of the evidence adduced at trial, the unavailability of Butera and Hourrigan in any way resulted in specific prejudice to their defense. This failure is fatal to their claim.[11]

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[11] As noted in *United States* v. *Vispi*, — F.2d —, Slip op. 513, 517, n.4 (2d Cir., November 15, 1976), this Court has not yet been squarely faced with the issue of whether both prongs of the standard set forth in *Marion;* i.e., specific prejudice and the Government using pre-indictment delay as a device to gain a tactical advantage over the accused, must be met before a pre-indictment delay argument can succeed. In any event, there has been no showing in this case of improper action on the part of the Government.

POINT III

There Was Sufficient Evidence To Convict Appellant Malone.

Appellant Malone argues there was insufficient evidence to sustain a conviction on Count One, the conspiracy count, and Count Three, the $4,500 Boland-Armond score at the 114th Precinct. He contends there is no "evidence tending to connect Malone with any crime," other than a conversation between Malone and the other detectives out of Boland's hearing at the 114th Precinct station house. Malone's argument borders on the frivolous.

Indeed, viewing the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974), it is clear that there was more than sufficient evidence on the basis of which a reasonable juror could have found appellant Malone guilty. *United States* v. *Rivera*, 513 F.2d 519, 528-530 (2d Cir.), *cert. denied*, 423 U.S. 948, 96 S. Ct. 367 (1975); *United States* v. *Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States* v. *Taylor*, 464 F.2d 240, 243-245 (2d Cir. 1972); *United States* v. *Falcone*, — F.2d —, Slip op. 345, 350-351 (2d Cir., November 1, 1976).

When Quinones was seized, Malone conferred with Fasanella, Butera and Jiminez over where to place the arrest, it finally being agreed that the case would be taken to Manhattan (209-210). Thereafter, Malone took part in a conversation with Fasanella, Jiminez and Butera at the party held for the Bronx Assistant District Attorneys, in which Fasanella was told by the trio that his presence on the team was reducing their shares too much. Malone also stated to Fasanella that his (Malone's) share from the Quinones seizure was so small ($400) that he had given it away (218-219).

In addition, on March 18, 1971, Malone, Butera and Jiminez seized Boland, Armond and Patten. Despite the absence of any appearance of criminality, even in Jiminez' testimony, Armond and Boland were dragged down to the 114th Precinct by the team after they refused to surrender the $12,500 (533-534). Malone even drove Armond's car to the precinct (535). Once in an upstairs squad room, Boland and Armond were confronted and threatened by all three detectives (537). Finally, Boland told Jiminez that he and Armond were willing to pay $4,500. In Boland's presence, Jiminez called over Malone and Butera and conferred with them and then agreed to accept the money (538-539), and it was Malone who came back with receipts for Boland and Armond to sign in an incorrect amount (539).

Finally, during the June 10, 1971, arrest of Pedro Lebron, Lebron saw Jiminez and Malone counting his $2,000. Malone and Jiminez both refused to give Lebron a receipt (661-662), and it was Malone whom Lebron last saw with the money (663), none of which was ever returned to Lebron. Furthermore, it was stipulated there were no New York Police Department Property Clerks vouchers submitted with respect to any money taken from Lebron, as required by police procedures (496-497).

Contrary to appellant Malone's claim, there was thus overwhelming evidence clearly showing Malone's active participation in the Quinones, Boland-Armond and Lebron scores. In addition, Malone's own statements at the party following the theft from Quinones could leave no doubt of his desire to continue to enrich himself by participating in the SIU criminal enterprises and constituted clear and certain evidence from which the jury could have found that he was indeed a co-conspirator in the SIU.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
December 29, 1976

Respectfully submitted,

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Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN VALENTI, being duly sworn, says that on the 5th day of January, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a CORRECTED BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Michael S. Washor, Esq.	Jay Horlick, Esq.
16 Court Street	888 Seventh Ave.
Brooklyn, N.Y. 11201	New York, N.Y. 10019

Evelyn Valenti

Sworn to before me this
5th day of Jan. 1977

Olga J. Maugeri

OLGA J. MAUGERI
Notary Public, State of New York
No. 24-01966
Qualified in Kings County
Commission Expires March 30, 1977